In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that * * * after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect * * *.

The applicability of these Guidelines is subject to the limitations on use set forth in §1608.11.

§1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) *Adverse effect.* Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, title VII proscribes practices which ''tend to deprive'' persons of equal employment opportunities. Employers, labor organizations and other persons subject to title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) *Effects of prior discriminatory practices.* Employers, labor organizations, or other persons subject to title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited labor pool.* Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and expericence necessary to perform the functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30290; 38297; 38299 (August 25, 1978));

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

§1608.4 Establishing affirmative action plans.

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) *Reasonable self analysis.* The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self analysis. The employer may utilize techniques used in order to comply with Executive Order 11246, as amended, and its implementing regulations, including 41 CFR part 60–2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis similar to that required under other Federal, State, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to title VII should be concerned with the effect on its employment practices of circumstances which may

be the result of discrimination by other persons or institutions. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(b) *Reasonable basis.* If the self analysis shows that one or more employment practices:

(1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited,

(2) Leave uncorrected the effects of prior discrimination, or

(3) Result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate.

It is not necessary that the self analysis establish a violation of title VII. This reasonable basis exists without any admission or formal finding that the person has violated title VII, and without regard to whether there exists arguable defenses to a title VII action.

(c) *Reasonable action.* The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(1) *Illustrations of appropriate affirmative action.* Affirmative action plans or programs may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council ''Policy Statement on Affirmative Action Programs for State and Local Government Agencies,'' 41 FR 38814 (September 13, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FR 38290; 38300 (Aug. 25, 1978). That statement reads, in relevant part:

> When an employer has reason to believe that its selection procedures have * * * exclusionary effect * * *, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:
>
> The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;
>
> A recruitment program designed to attract qualified members of the group in question;
>
> A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;
>
> Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;
>
> The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;
>
> A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and
>
> The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) *Standards of reasonable action.* In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(i) The plan should be tailored to solve the problems which were identified in the self analysis, see §1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(ii) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

(d) *Written or unwritten plans or programs*—(1) *Written plans required for 713(b)(1) protection.* The protection of section 713(b) of title VII will be accorded by the Commission to a person subject to title VII only if the self analysis and the affirmative action plan are dated and in writing, and the plan otherwise meets the requirements of section 713(b)(1). The Commission will not require that there be any written statement concluding that a title VII violation exists.

(2) *Reasonable cause determinations.* Where an affirmative action plan or program is alleged to violate title VII, or is asserted as a defense to a charge of discrimination, the Commission will investigate the charge in accordance with its usual procedures and pursuant to the standards set forth in these Guidelines, whether or not the analysis and plan are in writing. However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

§ 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.

Under title VII, affirmative action compliance programs adopted pursuant to Executive Order 11246, as amended, and its implementing regulations, including 41 CFR part 60–2 (Revised Order 4), will be considered by the Commission in light of the similar purposes of title VII and the Executive Order, and the Commission's responsibility under Executive Order 12067 to avoid potential conflict among Federal equal employment opportunity programs. Accordingly, the Commission will process title VII complaints involving such affirmative action compliance programs under this section.

(a) *Procedures for review of Affirmative Action Compliance Programs.* If adherence to an affirmative action compliance program adopted pursuant to Executive Order 11246, as amended, and its implementing regulations, is the basis of a complaint filed under title VII, or is alleged to be the justification for an action which is challenged under title VII, the Commission will investigate to determine whether the affirmative action compliance program was adopted by a person subject to the Order and pursuant to the Order, and whether adherence to the program was the basis of the complaint or the justification.

(1) *Programs previously approved.* If the Commission makes the determination described in paragraph (a) of this section and also finds that the affirmative action program has been approved by an appropriate official of the Department of Labor or its authorized agencies, or is part of a conciliation or settlement agreement or an order of an administrative agency, whether entered by consent or after contested proceedings brought to enforce Executive Order 11246, as amended, the Commission will issue a determination of no reasonable cause.

(2) *Program not previously approved.* If the Commission makes the determination described in paragraph (a), of this section but the program has not been approved by an appropriate official of the Department of Labor or its authorized agencies, the Commission will: (i) Follow the procedure in §1608.10(a) and review the program, or (ii) refer the plan to the Department of Labor for a determination of whether it is to be approved under Executive Order 11246, as amended, and its implementing regulations. If, the Commission finds that the program does conform to these Guidelines, or the Department of Labor approves the affirmative action compliance program, the Commission will issue a determination of no reasonable cause under §1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action compliance program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of